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BEFORE THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION,
Petitioner
v.
UNITED STATES,
Respondent

## AMICUS BRIEF OF UNITED STATES STEEL CORPORATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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## TABLE OF CONTENTS


PAGE

Interest of the Amicus Curiae ..... 2

Summary of Argument ..... 5

Reasons for Granting the Writ of Certiorari ..... 6

A. The Court of Customs And Patent Appeals Decision Repudiates Decisions Of The Supreme Court Of The United States ..... 6

B. The Decision Of The CCPA Nullifies The Congressional Judicial Review Provisions Of The Trade Act Of 1974 ..... 17

Conclusion ..... 24


## TABLE OF AUTHORITIES


CASES PAGE

*American Express Co.* v. *United States*, 67 Cust. Ct. 141, C.D. 4266, 332 F. Supp. 191 (1971), *aff'd*, 60 C.C.P.A. 86, C.A.D. 1087, 472 F.2d 1050 (1973) 7

*Downs* v. *United States*, 187 U.S. 496 (1903) ..... 9, 10, 11, 12, 24

*Hammond Lead Products, Inc.* v. *United States*, 63 Cust. Ct. 316, C.D. 3915, 306 F. Supp. 460 (1969), *rev'd.* 58 C.C.P.A. 129, C.A.D. 1017, 440 F.2d 1024 (1971), *cert. denied*, 404 U.S. 1005 (1971) ..... 18

*Hammond Lead Products, Inc.* v. *United States*, 58 C.C.P.A. 129, C.A.D. 1017, 440 F.2d 1024 (1971), *cert. denied*, 404 U.S. 1005 (1971) ..... 18, 20, 21, 22

*Nicholas & Co.* v. *United States*, 249 U.S. 34 (1919) ..... 12, 15, 16, 24

*United States* v. *Passavant*, 169 U.S. 16 (1898) .... 7, 11, 24

*Zenith Radio Corporation* v. *United States*, 78 Cust. Ct. ——, C.D. 4691, 430 F. Supp. 242 (1977), *rev'd*, 64 C.C.P.A. ——, C.A.D. 1195, —— F.2d —— (1977) ..... 6, 10, 11, 16, 23, 24

*Zenith Radio Corporation* v. *United States*, 64 C.C.P.A. ——, C.A.D. 1195, ——F.2d—— (1977) ..... 3, 4, 5, 16, 20, 21, 22, 23, 24

| STATUTES | PAGE |
|---|---|
| Tariff Act of 1897, 30 Stat. 205, Section 5 | 11 |
| Tariff Act of 1930, 46 Stat. 687 | |
| Section 303 (19 U.S.C. § 1303) | 11 |
| Section 516 (19 U.S.C. § 1516) | 18 |
| Trade Act of 1974, Public Law 93-618 (1975) | |
| Section 331 | 18, 19, 21 |

| OTHER | |
|---|---|
| H.R. Rep. No. 93-571 (Committee on Ways and Means), 93d Congress, 1st Sess. (1973) | 19 |
| S. Rep. No. 93-1298 (Committee on Finance), 93d Congress, 2d Sess. (1974) | 17, 19 |
| Hearings on H.R. 6767 before the House Committee on Ways and Means, 93d Congress, 1st Sess. (1973) | 21 |
| Brief of the United States filed with the Supreme Court in *Nicholas* | 15 |
| Transcript of interview of the Honorable Russell B. Long, Chairman of the Senate Committee on Finance, published in the Daily Report for Executives, No. 141 at p. J-1 (July 21, 1977) | 4 |


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## INTEREST OF THE AMICUS CURIAE

The Solicitor General of the United States has graciously granted consent of the government of the United States to United States Steel Corporation to file an *amicus curiae* brief in support of the petition of Zenith Radio Corporation. The Petitioner, Zenith Radio Corporation, has likewise extended by written permission its consent to the filing of an amicus brief by U. S. Steel.[1]

United States Steel Corporation initially filed countervailing duty complaints with the U. S. Treasury in September of 1968 alleging that the rebate or remission of the value-added taxes or cascade taxes, which obtained in six nations of the European Community, constituted a bounty or grant under our countervailing duty law. Those cases remained unresolved before Treasury until they were withdrawn by U. S. Steel in 1975.[2] U.S. Steel thereafter refiled updated complaints with the Treasury on September 18, 1975, alleging that the rebate or remission of the value-added tax in seven of the European Community nations constituted a subsidy under the countervailing duty law. On October 20, 1975,

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1. Letter dated August 25, 1977, from the Solicitor General of the United States, Wade H. McCree, Jr., attached as Exhibit 1. Letter dated September 13, 1977, from Frederick L. Ikenson, Special Counsel for Zenith Radio Corporation, attached as Exhibit 2.

2. Under the prior countervailing duty statute, there were no time limits imposed upon action to be taken by the Treasury; and after enactment of the Trade Act of 1974, which became effective on January 3, 1975, U. S. Steel Corporation withdrew the cases which had been pending for seven years with the Treasury because of the fact that all of the countries in Europe had adopted the value-added tax in replacement of their cascade taxes.



the Treasury found that the rebate or remission of the value-added tax did not constitute a bounty or grant within the meaning of our law. On April 14, 1976, U. S. Steel, under the new Trade Act, filed its complaint in the U. S. Customs Court seeking to reverse the Treasury determination; and the case is presently pending in that court.

The effect of the *Zenith* decision will reflect upon the effective enforcement of the countervailing duty statute, both substantively and procedurally. Its determination of the substantive aspects of what constitutes a bounty or grant under our countervailing duty statute will affect American companies manufacturing products which must compete with products exported to this country from all of the nations of the European Community, Sweden, Norway, Brazil, and a number of other nations which engage in rebating taxes upon export, whereas those taxes are imposed upon the same products when sold in their own countries. It is therefore apparent that the *Zenith* decision will have a far reaching effect upon American industry as it competes with imports which have been exempt from taxes in their countries when the products are sold here. The procedural determination of the Court of Customs and Patent Appeals will likewise determine for American manufacturers the scope and content of judicial review which was for the first time spelled out by Congress in passing the Trade Act of 1974. If the decision of the Court of Customs and Patent Appeals is left unresolved, it will, in essence, grant the Secretary of the Treasury unfettered discretion in making his determination as to whether or not there is a bounty or grant under the countervailing duty statute; such a result will effectively negate the judicial review provisions by making them a meaningless exercise in futility.

*Interest of the Amicus Curiae.*

The interest of the amicus curiae lies in its almost ten years of litigation with the government over the legal question of whether or not the rebate or remission of a so-called "indirect tax" constitutes a bounty or grant under our statute. The crisis in steel trade warrants the Supreme Court of the United States accepting the petition of Zenith so there might be the highest judicial pronouncement defining what is meant by a bounty or grant and to set forth the correct ambit of judicial review so that all industry in this country may be guided as to their rights and remedies from what they perceive to be unfair competition from subsidized imports coming into this country.

The importance of the *Zenith* decision to American trade and trade policy was well stated by the Honorable Russell B. Long, Chairman of the Senate Finance Committee, when he observed:

> "The Customs Court really shocked our trading partners in the world when they held that what these European countries and the Japanese and others were doing by rebating those value-added taxes on things being shipped to us amounts to a bounty that the foreign government is paying on their exports.
>
> "It is the duty of this country, under the law, to levy a countervailing duty of the same amount. Now, that is something that will make it more difficult for them to ship steel and television sets and a whole lot of things into the American market. In my opinion, that decision is right. It has been appealed. I know that all our friends in Europe are upset about it."[3]

3. Transcript of interview of the Honorable Russell B. Long published in the Daily Report for Executives, No. 141, p. J-1 at p. J-2 (July 21, 1977).



*Summary of Argument.*

## SUMMARY OF ARGUMENT

The divided decision of the United States Court of Customs and Patent Appeals is erroneous in having either ignored or nullified previous Supreme Court decisions and in negating the congressionally mandated judicial review provisions so as to reinstate its prior decision which Congress had explicitly overruled by the judicial review provisions of the 1974 Trade Act.

The intermediate appellate court chose to ignore prior Supreme Court decisions which set forth the definition and meaning of "bounty or grant" within the countervailing duty statute. The Court of Customs and Patent Appeals majority stated that the Supreme Court pronouncements were either dicta or were not germane to the problems of trade as they may exist today. The pronouncements of this Court, albeit several decades old, in fact substantively define a bounty or grant as comprehending the rebate or remission of taxes as involved in the *Zenith* decision. Furthermore, even if the clear pronouncements of this Court were in fact dicta, it is not up to the intermediate appellate court to choose to ignore the teaching of the Supreme Court and to come up with a result that is opposed to the judicial interpretations of this Court. The majority opinion of the lower court placed great reliance on long established Treasury practice. Great mischief will arise if the proposition is permitted to stand that the Executive Branch may change the law if its interpretation, contrary to statute and judicial construction, continues for a sufficiently long period of time.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

### A. The Court Of Customs And Patent Appeals Decision Repudiates Decisions Of The Supreme Court Of The United States

The decisions of this Court have stated the proper criteria from an economic, legal, and eminently pragmatic means of enforcing the countervailing duty statute. It is acknowledged that the Treasury finds a bounty or grant when there is remission or rebate of a so-called "direct tax", whereas it does *not* countervail against the rebate or remission of a so-called "indirect tax". The Treasury Department has found subsidies and imposed the countervailing duty statute on any number of foreign schemes which have had the effect of benefiting an exporter shipping his goods to this country as opposed to selling in his own market. Any direct payment of a bonus to an exporter for shipping his goods abroad, any special government reduction in freight rates for exporters, and any government grants or preferential treatment to exporters which are available only when one exports are benefits conferred that the Treasury would find are grants or bounties within the meaning of our countervailing duty statute. We submit that the "indirect tax" situation is the only circumstance in which the Treasury has carved out this unique exception which has been the subject matter of controversy in international trade negotiations and which now constitutes the subject matter of the *Zenith* decision.[4]

4. And indeed in the U. S. Steel decade of litigation on this issue, this has been the area that has surfaced and provided the problem that is the subject matter of this petition for *certiorari*. In fact, U. S. Steel filed a countervailing duty case, along with other transmission tower manufacturers, charging there were export subsidies by the Italian Government under various of its statutes. The Treasury Department found that a number of the Italian actions dealing with so-called rebates or remissions of direct taxes, as well as other preferential export treatment, constituted a bounty or grant and levied countervailing duties with respect to those items. However, with respect to the question of the rebate or remission of the Italian indirect turnover tax, the Treasury Department made no ruling and in fact has failed to this time to make any ultimate determination of that issue. The decision by Treasury was the subject of judicial review by the importers, which paradoxically enough the Court of Customs and Patent Appeals found to be proper—permitting judicial review by importers but not judicial review by an American manufacturer. See *American Express Co.* v. *United States*, 67 Cust. Ct. 141, C.D. 4266, 332 F. Supp. 191 (1971), *aff'd* 60 C.C.P.A. 86, C.A.D. 1087, 472 F.2d 1050 (1973).



Mr. Chief Justice Fuller observed the wisdom of finding a bounty or grant without regard to the tyranny of labels and is, we submit, the foundation for the correct economic and legal interpretation of our statute. His profound observations occurred in *United States* v. *Passavant*,[5] where the Chief Justice stated in part:

> "Doubtless to encourage exportation and the introduction of German goods into other markets, the German Government could remit or refund the tax, pay a bonus, or allow a drawback.
>
> "And it is found that in respect of these goods when 'purchased in bond, or consigned while in bond, for exportation to a foreign country, this duty is remitted by the German Government, and is called "bonification of tax," as distinguished from being refunded as a rebate.' The use of the word 'bonifica-

5. 169 U.S. 16 at 23 (1898).

tion' does not change the character of this remission. It is a special advantage extended by the government in aid of manufacturers and trade, having the same effect as a bonus or drawback. To use one of the definitions of drawback, it is 'a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all.' "

This pronouncement of the Chief Justice, we submit, served as the cornerstone for the later pronouncements of this Court as to the proper interpretation of what constitutes a subsidy under the countervailing duty statute. These decisions, going back to the statement of Chief Justice Fuller, represent a sound judicial approach which incorporates eminently valid economics—only the amount of the bounty has economic significance and one must not become bogged down in the nicety of definitional labels which has plagued the Treasury in its narrow exception for the rebate or remission of "indirect taxes". This Court has taught that the only pertinent inquiry is whether or not goods exported to the United States have been relieved of a burden (whether a tax or some other designated label) that would otherwise have been imposed on the sale of goods if sold in the country of exportation. If the goods are exempt from a tax or other burden on export, then there is a bounty or grant in the amount of that rebate or remission.

It is with this beginning that one must read and reference the landmark decision of this Court in the area of countervailing duty jurisprudence that occurred in *Downs* v. *United States*.[6] In *Downs* the Russian Govern-

6. 187 U.S. 496 (1903).



ment resorted to a complex method of subsidizing sugar exports. The scheme involved two export incentives. The first was to relieve exported sugar of an excise tax that otherwise would have been imposed if the product had been sold in Russia. Second, the exporter then received a certificate permitting him to transfer sugar, in the amount exported, from one classification in the domestic market to a more favorable classification; this certificate was a valuable and transferable item. The United States imposed a countervailing duty on Russian sugar imported into this country. On ultimate appeal to the Supreme Court, it was held:

"... [*B*]*ut, if a preference be given to merchandise exported over that sold in the home market, by the remission of an excise tax, the effect would be the same as if all such merchandise were taxed, and a drawback repaid to the manufacturer upon so much as he exported.* If the additional bounty paid by Russia upon exported sugar were the result of a high protective tariff upon foreign sugar, and a further enhancement of prices by a limitation of the amount of free sugar put upon the market, we should regard the effect of such regulations as being simply a bounty upon production, although it might incidentally and remotely foster an increased exportation of sugar; but where, in addition to that, these regulations exempt sugar exported from excise taxation altogether, we think it clearly falls within the definition of an indirect bounty upon exportation.

* * *

"... If no bounty at all were paid, all sugar, or at least all 'free sugar,' would pay the same tax, whether sold at home or exported abroad; and in

this case the free sugar upon which the tax is remitted when exported would go abroad burdened with an excise tax of R. 1.75 *per pood, which would prevent the manufacturer from selling it at such a price abroad as would enable him to realize a profit." [Emphasis added][7]

The reading of the *Downs* decision and this clear and precise language shows that the Supreme Court of the United States was making a substantive determination and not merely engaging in extraneous dicta. Any doubt on this point can be eliminated by reference to the briefs of the parties in submitting the issue to the Supreme Court. From those briefs it is abundantly clear that the parties were arguing to this Court the specific issue involved in the *Zenith* case and the U. S. Steel case pending in the Customs Court; namely, whether or not the rebate or remission of an excise tax (an "indirect tax") constitutes a bounty or grant under our countervailing duty statute. In the briefs it was stipulated by the parties that the export subsidies involved in the *Downs* case were: (a) that the imported sugar would have been subject to an excise tax if sold in Russia but that the sugar exported to the United States was relieved of that excise tax either by way of a refund or a cancellation of indebtedness; (b) that the government issued to the exporter a certificate showing he had exported a quantity of so-called free sugar, and this cer-

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7. *Downs* v. *United States,* 187 U.S. 496, at 513-515 (1903). The language is so extremely important in perceiving that the method of subsidy is unimportant. The majority in the lower court raised an irrelevancy—the difficulty in ascertaining the economic impact of a tax rebate—and thereby placed themselves at odds with this Court.



tificate had market value, which was transferable. It is quite clear that one of the crucial issues presented to the Supreme Court was whether or not the remission of the excise tax constituted a bounty or grant, and the court unequivocally responded that it did.[8]

The unanimous three-judge decision by the United States Customs Court finding that the rebate or remission of the Japanese commodity tax constituted a subsidy under our countervailing duty statute clearly understood the rationale and teaching of the Supreme Court in the *Passavant* and *Downs* decisions. This reference to Chief Justice Fuller in *Passavant* and the meaning of the landmark decision in *Downs* was particularly highlighted in the opinion written by Judge Newman.[9] Although countervailing duties were not involved in *Passavant,* Chief Justice Fuller's economic analysis of the German tax rebate scheme is illuminating.[10]

*Passavant* was cited by the Supreme Court in two landmark decisions construing the scope of the 1897 general countervailing duty statute, which is the progenitor of section 303 of the Tariff Act of 1930 (19 U.S.C. §1303), as amended: *Downs* v. *United States,* 187 U.S. 496 (1903); and *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919). Suffice it to state that the Supreme Court has unequivocally enunciated that the rebate or remission of a tax on exported products, where such taxes have been imposed on a domestic sale in the coun-

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8. These stipulated facts appear in the opinion of the Supreme Court, 187 U.S. 496 at 511 (1903).

9. 430 F. Supp. 242 at 252 (1977).

10. 169 U.S. 16 at 22-23 (1898).

try of exportation, constitutes a bounty or grant under the countervailing duty statute.

After the *Downs* decision, the countervailing duty statute was periodically reenacted by Congress, but was never amended to except tax remissions from its ambit. Fundamentally, such repeated reenactments without excepting tax remissions is significantly indicative of a congressional intent to approve the judicial construction of the countervailing duty statute.

Some sixteen years after the *Downs* decision, this Court had further occasion to restate its strong views on the breadth and scope of the countervailing duty statute. This judicial pronouncement setting forth the scope and meaning of the statute once again was in the *Nicholas* case.[11] In *Nicholas* the British Government provided an allowance to exporters of gin, and this country imposed a countervailing duty in the amount of such allowance. The Supreme Court upheld the imposition of countervailing duties and provided rather elaborate commentary on the proper meaning and interpretation of our countervailing duty statute. In rejecting certain technical arguments made to this Court, it stated in part:

> ". . . We do not find it necessary to go into such confusing considerations. The question in the case is more direct, and is whether the threepence and fivepence paid on account of export from the United Kingdom is the bestowal 'directly or indirectly' of a 'bounty or grant upon the exportation of any article or merchandise from such country' . . . .

11. 249 U.S. 34 (1919).



"Looking only at the paragraph and judging from the first impressions of its words, the problem presented would seem to be without difficulty. There is paid to an exporter of spirits from the United Kingdom the sum of three or fivepence a gallon, as the case may be, *and the instant conclusion is that the sale of spirits to other countries is relieved from a burden that their sale in the United Kingdom must bear*. There is a benefit, therefore, in exportation,—an inducement to seek the foreign market. . . .

* * *

". . . Every new statute is individual and presents its own problem. That before us does, and, as we have said, looking at its words alone, has no uncertainty of purpose. Whenever any country 'shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise,' there shall be levied and paid upon it, upon importation, in addition to the regular duty, an additional one 'equal to the net amount of such bounty or grant, however the same be paid or bestowed.' The statute was addressed to a condition, and its words must be considered as intending to define it, and all of them—'grant' as well as 'bounty'—must be given effect. If the word 'bounty' has a limited sense, the word 'grant' has not. A word of broader significance than 'grant' could not have been used. Like its synonyms 'give' and 'bestow,' it expresses a concession,—the conferring of something by one person upon another. And if the 'something' be conferred by a country 'upon the exportation of any article or merchandise,' a countervailing duty is required. . . .

* * *

"Our conclusion is supported, we think, by *United States* v. *Passavant,* supra, a case from which counsel have adduced some argument. . . .

* * *

"Downs v. United States, 187 U.S. 496, 47 L.ed. 275, 23 Sup. Ct. Rep. 222, is a like example, and direct and indirect bounties are illustrated. As an instance of the former the amount paid upon the production of sugar under the Act of Congress of October 1, 1890 [26 Stat. at L. 567, chap. 1244], is adduced, and also the 'drawback' (the word of the statute is used) upon certain articles exported; *as instances of the latter, that is, of indirect bounties, the remission of taxes upon the exportation of articles which are subject to a tax when sold or consumed in the country of their production is given, and, as another example, the laws permitting distillers of spirits to export the same without payment of an internal revenue tax or other burden.*" [Emphasis added][12]

This expansive interpretation of the countervailing duty statute by the Supreme Court had been urged by the United States in the government brief filed with the court in *Nicholas;* in the government brief it was pointed out that Congress, in using the words "bestow" and "grant", intended to make the statute "broad and all inclusive". And in the U. S. government brief, it rejected the argument of the British that the export allowance was designed only to prevent its producers from being placed at a disadvantage vis-a-vis foreign competitors who did not bear the tax costs imposed on the British spirits; the United States responded that the only proper

12. 249 U.S. 34 at 37-41 (1919).



point of view is from the position of the U. S. as an importing country where the effect of the British allowance is a bounty or grant. Finally, the brief by the United States rejected the argument that inaction by Treasury in imposing countervailing duties precluded enforcement; indeed Treasury practice had apparently countenanced such export rebates by not applying the countervailing duty law to that type of situation. The government brief to this Court pointed out the fundamental legal view:

> "The long-deferred action of the Secretary of the Treasury in ascertaining, determining and declaring the net amount of the bounty or grant paid or bestowed by the Kingdom of Great Britain and Ireland presents no reason why our Government should not now levy and collect the additional duty prescribed by paragraph E, section IV, tariff act of 1913. *The failure of an executive department to enforce a statute does not effect a repeal thereof.*" [Emphasis added][13]

This Court has taught us that the rebate or remission of any tax on products exported, where the taxes would otherwise have been imposed on a domestic sale in the country of exportation, constitutes a bounty or grant subject to the imposition of countervailing duties under our statute. All three judges of the Customs Court in the *Zenith* case and two of the dissenting judges in the Court of Customs and Patent Appeals have so interpreted and followed the teachings and holdings of the Supreme Court of the United States. It is, we sub-

13. Brief of the United States filed with the Supreme Court in the *Nicholas* case, at p. 44; the other references appear at pp. 33 and 35 of the brief.

mit, improper for the three-judge majority of the CCPA to ignore the Supreme Court decisions by denoting them as merely dicta and thereby place their mark of approval upon Treasury Department interpretation that is at variance with Supreme Court holdings. This Court has not had occasion to address itself to this issue since *Nicholas* in 1919, but nonetheless the judicial pronouncements of this Court[14] must remain binding upon the lower federal judiciary, and it is only this Court which may reexamine and overturn its own decisions if it finds that the previous cases were improvidently decided. We urge that this Court find that this issue, in the context of today's world and the confusion created by the majority opinion of the CCPA, warrants the grant of *certiorari* so that the Supreme Court may again afford the necessary clarity and teaching for the enforcement of our countervailing duty statute.

The final point is the need for this Court to deal with the specific uniqueness granted to "indirect taxes" by the Treasury which has found affirmance by the three-judge majority of the CCPA. The Senate Finance Committee Report, which accompanied the Trade Act of 1974, addressed itself to the artificiality of the distinction between direct and indirect taxes and stated in part:

> "(5) The Committee also believes that GATT provisions on tax adjustments in international trade should be revised to assure that they will be trade neutral. Present provisions permit adjustments on traded goods for certain indirect taxes but not for direct taxes. The Committee expects that the President will seek such modification of present rules as

14. Absent Congress changing the law to overturn a Supreme Court decision.



> would remove any disadvantage to countries like the United States relying primarily on direct taxes and put all countries on an equal footing."[15]

**B. The Decision Of The CCPA Nullifies The Congressional Judicial Review Provisions Of The Trade Act Of 1974**

In 1971 the Court of Customs and Patent Appeals held that an American manufacturer had no right of judicial review from an adverse decision of the Secretary of Treasury finding that there was no bounty or grant under the countervailing duty statute. In *Hammond Lead Products, Inc.* v. *United States,*[16] the United States Customs Court had on appeal by an American manufacturer overruled Treasury and found that certain actions by Mexico on the importation of litharge into this country constituted a subsidy under our statute; as part of that finding it found that the rebate of indirect taxes came within the purview of our statute. On appeal a divided CCPA reversed the Customs Court by finding that although an importer had the right of judicial review from an affirmative decision of the Treasury finding a bounty or grant an American manufacturer was not entitled to judicial review.[17] The CCPA held that the countervailing duty statute was a penalty and that the Secretary of the Treasury had the unfettered discre-

15. S. Rep. No. 93-1298 (Committee on Finance), 93d Congress, 2d Sess. 84 (1974).

16. 63 Cust. Ct. 316, C.D. 3915, 306 F. Supp. 460 (1969), *rev'd,* 58 C.C.P.A. 129, C.A.D. 1017, 440 F.2d 1024 (1971), *cert. denied,* 404 U.S. 1005 (1971).

17. 58 C.C.P.A. 129, C.A.D. 1017, 440 F.2d 1024 (1971), *cert. denied,* 404 U.S. 1005 (1971).

tion whether or not to impose a penalty; and therefore, it was beyond the purview of judicial review on the matter of whether or not the Secretary should have in fact imposed a countervailing duty.

Congress in enacting the Trade Act of 1974 found the decision of the Court of Customs and Patent Appeals in *Hammond Lead Products* to be out of consonance with basic principles of fairness and equity in depriving an American manufacturer of a right of judicial review which the court had held existed for importers.[18] The House Report accompanying this provision stated the purpose of Congress in providing for the judicial review provisions:

> "Section 331(b) of the bill would amend subsections (a), (b), and (c) of section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516), to provide for judicial review of negative countervailing duty determinations by the Secretary of the Treasury. The amendment is necessitated by a 1971 decision of the Court of Customs and Patent Appeals (*United States* v. *Hammond Lead Products, Inc.*, 58 C.C.P.A. 129, C.A.D. 1017), which held that judicial review of negative countervailing duty determinations was not available to domestic producers. Your committee is concerned that this decision might adversely affect the ability of American producers to obtain meaningful relief under the countervailing duty law, and believes that the amendment is also warranted, equitably, because American producers have a right to judicial review in the customs courts of other customs determinations involving duty assessments, and importers are entitled to judicial review of the actual assessment of countervailing duties."[19]

The Senate Report accompanying the amendments to the countervailing duty statute observed the *mandatory* nature of the countervailing duty statute and pointed out that for the first time the Secretary of the Treasury was required to act upon complaints within a specified period of time.[20] Despite these explicitly conceived and directed congressional mandates: (1) overruling

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18. Section 331 of the Trade Act of 1974 made amendments to §§ 303 and 516 of the Tariff Act of 1930, which resulted in the right of judicial review for an American manufacturer from an adverse decision by the Treasury Department. The appeal of United States Steel Corporation from the adverse ruling of the Treasury decision on the rebate or remission of the value-added tax from Europe constituted the first case taken by an American manufacturer under that provision; the *Zenith* decision was the second appeal taken by an American manufacturer, but is the *first* case that has come before the CCPA involving the judicial review provisions since its enactment in the Trade Act of 1974.

19. H.R. Rep. No. 93-571 (Committee on Ways and Means), 93d Congress, 1st Sess. 76 (1973).

20. "Section 331 of the bill would amend the present countervailing duty law. In the past, the administration of the countervailing duty law has been subject to considerable criticism. Although the present statute is, by its terms, mandatory, there is no period stipulated within which the Secretary of the Treasury must make his determination as to whether or not a bounty or grant exists. The Committee has been concerned over the past years that the Treasury Department has used the absence of time limits to stretch out or even shelve countervailing duty investigations for reasons which have nothing to do with the clear and mandatory nature of the countervailing duty law. . . ." S. Rep. No. 93-1298 (Committee on Finance), 93d Congress, 2d Sess. 183 (1974).

the *Hammond Lead Products* decision of the Court of Customs and Patent Appeals and specifying the right of judicial review for an American manufacturer, (2) specifying time limits in which the Secretary must act, and (3) reaffirming the mandatory obligation of the Secretary to administer the countervailing duty law, the CCPA in *Zenith* effectively overruled the congressional amendments and returned the law to the same state that it was in after that court had decided the *Hammond Lead Products* case. This result is inherent in the finding by the majority, which stated as follows:

> "The intent of Congress, as expressed in §303 itself, is not difficult to fathom. . . . Congress' intent to provide a wide latitude, within which the Secretary of the Treasury (Secretary) may determine the existence or non-existence of a bounty or a grant, is clear from the statute itself, and from the congressional refusal to define the words 'bounty,' 'grant,' or 'net amount,' in the statute or anywhere else, for almost 80 years. As affects the present case, and consistent with that broad intent, Congress has not statutorily required that every governmental action distinguishing between products consumed at home and those exported shall be deemed the bestowing of a bounty or grant.
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> * * *
>
> "Since 1898, the Treasury Department has consistently and uniformly interpreted §303 as requiring that there be an 'excessive' remission of an excise tax, i.e., the governmental giving of something above and beyond mere excise tax remission, to have a bounty or grant. Conversely, it has consistently and uniformly for now almost 79 years, interpreted §303 as not requiring that the mere remission of an excise tax, i.e., a 'non-excessive' remission of the type now before us, be deemed a bounty or grant."[21]



If there is to be any meaningful implementation given to the judicial review provisions of the Trade Act of 1974, we urge that this Court review the decision of the CCPA in *Zenith* to provide a rational approach to the statutory amendment consistent with its language and the spirit and intent of Congress in enacting it.

The Treasury Department lobbied very hard in the congressional consideration of the Trade Act of 1974 and urged Congress to sustain the *Hammond Lead* decision by continuing to make Treasury's negative determinations nonreviewable. In doing so Treasury adopted the reasoning of the Court of Customs and Patent Appeals decision in *Hammond Lead Products,* which had found that Congress did not want negative decisions reviewed because they presented difficult international trading problems and consequently it was best to leave unreviewable discretion in the Secretary. Congress rejected this plea of the Treasury and adopted the judicial review provisions, maintaining the mandatory nature of the statute and adding specific time limits in which a decision must be made.[22]

In spite of the clear language of Congress in explicitly overruling the *Hammond Lead Products* decision and providing an American manufacturer with judicial

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21. C.A.D. 1195 at 13-14 and 20-21 (1977).

22. See Hearings on H.R. 6767 before the House Committee on Ways and Means, 93d Congress, 1st Sess. 254 (1973).

review—which evidenced a strong congressional desire to provide equity and parity to the American manufacturer to be able to obtain judicial review of Treasury decisions—the Court of Customs and Patent Appeals misread or misunderstood the entire purpose and again retreated to its escape approach in *Hammond Lead Products,* which refers to the Secretary of the Treasury's unfettered discretion. And the effect of *Zenith* is to thwart an aggrieved American manufacturer from obtaining meaningful judicial review of a negative decision by the Treasury on any claim of import subsidies. A further inequity results by apparently restoring the preferred position of the importer, who presumably under the cloudy decision of the majority opinion in *Zenith* will be able to have judicial review from an affirmative decision that has effectively been precluded to an American manufacturer of a negative Treasury decision.

Judge Miller in his dissent in the *Zenith* decision pointed out the fact that Congress had overruled that court in the *Hammond Lead Products* case and that it had gone to great lengths to provide meaningful review which was being emasculated by the majority opinion.[23]

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23. ". . . With respect to what has occurred since 1973, provision in the Trade Act of 1974 for judicial review of the Secretary's determination that a bounty or grant is not being paid on foreign merchandise reflects, as shown *infra* note 26, expressed *Congressional concern* over 'inaction or insufficient action, or . . . excessive delay in the administrative process.'

"That provision was enacted in response to the majority opinion of this court in *United States v. Hammond Lead Products, Inc., supra* note 3. . . .

* * *



Indeed the majority view in *Zenith,* which upheld the long-standing Treasury practice of carving out for special treatment the rebate or remission of indirect taxes caused the unanimous Customs Court to comment on that facet, as evidenced by Judge Boe's decision:

> "If, as the defendant contends, a longstanding administrative interpretation of the countervailing duty statute should alone dictate the presently accepted legal construction thereof, then, indeed, judicial review becomes a mockery."[24]

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"On appeal, this court, split 3-2, held that the Customs Court lacked jurisdiction. . . .

* * *

"The response of Congress was to include in the Trade Act of 1974 an amendment to section 516 which, as noted above, provides for judicial review of the Secretary's determination that a bounty or grant is not being paid on foreign merchandise. . . ."

C.A.D. 1195 at 36, 38, and 40 (1977).

24. 430 F. Supp. 242 at 262-263 (1977).

## CONCLUSION

In order to provide an acceptable interpretation of this Court's own decisions, it is submitted that the petition for *certiorari* by Zenith should be granted. The fact that five judges have found that this Court's opinions in *Downs, Nicholas,* and *Passavant* were substantive and clear that the rebate or remission of an indirect tax constituted a bounty or grant, whereas three judges of the CCPA found to the contrary, shows the need for the Supreme Court to address itself to these topical and most important issues affecting American manufacturers and international trade. There is now an inevitable confusion in the administration of the statute; and if the *Zenith* decision is left as it presently stands, the American manufacturer will effectively have been precluded from judicial review to correct any perceived wrongs which it may believe have occurred as a result of a negative decision by the Treasury Department. We submit that it is time for the Supreme Court to take up the *Zenith* decision and clarify these important issues.

Respectfully submitted,

D. B. KING
J. J. MANGAN

By .....
D. B. King

Attorneys for United States
Steel Corporation
600 Grant Street
Pittsburgh, Pennsylvania 15230

Dated: October 14, 1977

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## EXHIBIT 1

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D.C. 20530
August 25, 1977

D. B. King, Esquire
United States Steel Corporation
600 Grant Street
Pittsburgh, Pennsylvania 15230

Re: Zenith Radio Corporation v.
United States, No. 77-19 (C.C.P.A.)

Dear Mr. King:

I hereby consent to the filing of a brief *amicus curiae* on behalf of the United States Steel Corporation in this case in the Supreme Court, in the event that a petition for a writ of certiorari is filed.

Sincerely,

WADE H. MCCREE, JR.
Solicitor General

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*Exhibit 2.*

**EXHIBIT 2**

STEWART & IKENSON
ATTORNEYS AT LAW
1001 Connecticut Avenue
Washington, D.C. 20036
EUGENE L. STEWART
FREDERICK L. IKENSON
TELEPHONE
(202) 785-4185
TELEX 89-533

September 13, 1977

D. B. King, Esquire
United States Steel Corporation
600 Grant Street
Pittsburgh, Pennsylvania 15230

Dear Mr. King:

Re: Zenith Radio Corporation v.
United States, No. 77-19 (C.C.P.A.)

Please be advised that Zenith Radio Corporation consents to the filing of a brief *amicus curiae* on behalf of United States Steel Corporation in this case in the Supreme Court, once Zenith's petition for a writ of certiorari is filed.

Very truly yours,

FREDERICK L. IKENSON
Special Counsel for
Zenith Radio Corporation